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VIA ECFS

REDACTED – FOR PUBLIC INSPECTION

February 7, 2005

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
Room TW-A325
445 12th Street, S.W.
Washington, DC 20554

Re: *In the Matter of Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) Pertaining to Qwest's xDSL Services*, WC Docket No. 04-416

Dear Ms. Dortch:

Enclosed with this cover letter for filing today via the FCC's Electronic Comment Filing System are the redacted Reply Comments of Qwest Corporation and attached (thereto) Reply Declaration of Rex Morse regarding the Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) Pertaining to Qwest's xDSL Services. The non-redacted versions of these documents, which contain confidential (non-redacted) information, are being filed today in hard copy under separate cover.

Pursuant to the December 1, 2004 *Protective Order* in WC Docket No. 04-416, 19 FCC Rcd. 23512, all pages of the confidential versions of these documents are marked "***NON-REDACTED -- NOT AVAILABLE FOR PUBLIC INSPECTION***", since it was not feasible for the confidential information to be physically separated (*see* Section 0.459(a) of the Commission's rules, 47 C.F.R. § 0.459(a)). All pages of the non-confidential versions of the Reply Comments and the Reply Declaration of Rex Morse are marked "***REDACTED -- FOR PUBLIC INSPECTION***". As well, in the redacted versions of these documents, where confidential information has been removed, the relevant portions of the text are marked "[Redacted]".

If you have any questions regarding this submission, please contact the undersigned at the contact information reflected in the letterhead.

Sincerely,

/s/ Daphne E. Butler

Enclosures

cc: Janice Myles (copy via e-mail at Janice.myles@fcc.gov)
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Parties to Proceeding (copies via U.S. Mail)

REDACTED – FOR PUBLIC INSPECTION

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Petition of Qwest Corporation for	)	WC Docket No. 04-416
Forbearance Pursuant to 47 U.S.C. § 160(c)	)	
Pertaining to Qwest's xDSL Services	)	

REPLY COMMENTS OF QWEST CORPORATION

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REPLY COMMENTS OF QWEST CORPORATION

I. INTRODUCTION AND SUMMARY

Qwest faces vigorous competition in selling broadband services to the mass market. Cable modem service is the most popular of the competitors. Other networks are developing including wireless, satellite and broadband over power line. The Commission has acknowledged that "having multiple advanced networks will also promote competition in price, features, and quality of service among broadband access providers. The "price-and-service competition . . . will have a symbiotic, positive effect on the overall adoption of broadband: as consumers discover new uses for broadband access at affordable prices, subscribership will grow; and as subscribership grows, competition will constrain prices and incent the further deployment of new and next-generation networks and ever-more innovative services."[1] Qwest seeks forbearance from three sets of regulation that limit its ability to compete on price: dominant carrier tariff regulation, rate averaging, and the requirement of resale at an avoided cost discount.

In these reply comments, Qwest addresses oppositions that have been filed by several competitive local exchange carriers ("CLECs"), CLEC advocacy groups, Internet Service

[1] *Availability of Advanced Telecommunications Capability in the United States*, Fourth Report to Congress, at 43 (Sept. 9, 2004), 2004 FCC LEXIS 5157.

Providers ("ISPs"), and ISP advocacy groups concerning Qwest's petition.[2] Surprisingly, some of the opponents challenge Qwest's petition on the grounds that if the Federal Communications Commission ("Commission") grants the petition, then Qwest may lower prices. These opponents therefore buttress Qwest's claim that the regulations at issue inhibit price competition. Of course, lower prices are exactly the result that the Commission seeks in order for consumers to discover new uses for broadband, for subscribership to grow, and to incent further deployment of networks and of innovative services. While lower prices may not be beneficial to their businesses, the communications laws were not designed to guarantee that all competitive carriers will succeed in all markets.

A number of Qwest's opponents, including MCI, also claim that forbearance will be harmful to small and medium businesses because -- according to these commenters -- businesses are dependent upon xDSL services, and find cable modem service unacceptable. This argument is belied by MCI's recent announcement that it has entered a contract to buy cable modem service from Time Warner Cable, Cox and Comcast in order to resell it to retail end users, including businesses. MCI has boasted that with this new contract it can now reach 90% of American businesses.

Qwest's opponents, again including MCI, claim that forbearance will be harmful to Qwest's intramodal competitors because those competitors are dependent upon Qwest's network. They complain that cable modem and other competitors generally do not sell their service at wholesale. These opponents further argue that the Commission should not grant Qwest its requested relief until there is a robust wholesale market with multiple entities serving Qwest's rivals. Of course, accepting this argument would remove incentives for cable modem providers

[2] Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c), filed Nov. 10, 2004 ("petition").

to sell their services at wholesale because it would allow cable modem providers excessive leverage over the level of regulation under which Qwest must labor.

In Section II.A. of these Reply Comments Qwest argues that the regulations from which it seeks relief inhibit price competition and that even if the Commission grants Qwest's petition significant Title II regulation will remain. In Section II.B. Qwest addresses opponents' contentions regarding the wholesale and business markets and regarding the forbearance standard. In Sections II.C. through E., Qwest addresses the opponents' arguments that the forbearance standard is not met for the three sets of regulation at issue.

II. ARGUMENT

A. The Regulations From Which Qwest Seeks Forbearance Inhibit Price Competition In Mass-Market Broadband

Qwest seeks forbearance from dominant carrier tariff regulation, rate averaging, and the requirement of resale at an avoided cost discount. These regulations limit Qwest's ability to compete on price. Even commenters that oppose the petition admit that granting Qwest its desired relief will give Qwest "greater flexibility to compete head-to-head with cable for retail customers" and "may slightly reduce Qwest's cost of doing business."[3]

Despite the opposition to Qwest's petition, certain key facts are not in dispute. First, no one has denied that Qwest has significant facilities-based intermodal competition from cable modem. Nor does any commenter contest that Qwest's facilities-based competitors have made a substantial sunk investment in the facilities used to provide such services.

Turning to the specific regulations from which Qwest seeks forbearance, by and large there is no dispute that dominant carrier tariff rules reduce price competition between Qwest and

[3] *See* Opposition of The Federation of Internet Solution Providers of the Americas, WC Docket No. 04-416, filed Jan. 6, 2005 at 13, 32 ("FISPA").

other facilities-based providers, including the market-leading cable modem providers. No one disputes that consumers in urban areas would benefit from increased price competition if the Commission decided to forbear from rate averaging. Nor does anyone deny that averaged rates serve as a price umbrella for competitors. As to resale at the avoided cost discount, no one has pointed to any barrier other than each entity's private choice that prevents facilities-based intermodal competitors from reselling to local exchange carriers ("LECs") (or selling to unaffiliated ISPs for that matter).

Turning to the market dynamics, no commenter claims that Qwest has acted in an unreasonable or discriminatory manner with respect to the services at issue. This is an important concession as the Commission has already decided that it will not presume that Regional Bell Operating Companies ("RBOCs") will act in an unreasonable or discriminatory manner in the broadband market without evidence of such actions.[4] Accordingly, AT&T Corp.'s charges regarding BellSouth's actions in the market for special access are immaterial to Qwest's request for forbearance.[5]

Not only has Qwest not acted in an unreasonable or discriminatory manner, as explained in Qwest's petition, Qwest's behavior in the marketplace demonstrates that Qwest views CLECs and unaffiliated ISPs as a channel through which to further distribute Qwest's xDSL services. No commenter has pointed to any behavior by Qwest in the broadband market that would

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[4] *See In the Matters of Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c), SBC Communications Inc.'s Petition for Forbearance Under 47 U.S.C. § 160(c), Qwest Communications International Inc. Petition for Forbearance Under 47 U.S.C. § 160(c), BellSouth Telecommunications, Inc. Petition for Forbearance Under 47 U.S.C. § 160(c)*, *Memorandum Opinion and Order*, 19 FCC Rcd 21496, 21509 .n.85 ("*Section 271 Forbearance Order*"). Accordingly, AT&T's charges regarding BellSouth's provision of special access service are immaterial. *See, e.g.*, Opposition of AT&T, WC Docket No. 04-416, filed Jan. 5, 2005 at 12 ("AT&T").

[5] *See, e.g.*, AT&T at 12.

suggest otherwise.[6] Finally, no one has demonstrated that Qwest has any "ability profitably to raise and sustain" prices "significantly above competitive levels by restricting its own output"[7] in the retail broadband market. This is another important failure as the foregoing is the definition of market power used in classifying a carrier as dominant.[8]

Qwest's petition gave an example of price competition in a neighborhood in Omaha, Nebraska, where Cox, a cable modem competitor, responded to Qwest's roll out of DSL in the neighborhood by offering half price for six months on Cox's cable modem services.[9] One commenter asked why Qwest could not effectively respond.[10] The answer lies in the three categories of regulation from which Qwest seeks relief. First, the dominant carrier tariff regulations at issue require that if Qwest were to decrease price, for example by meeting Cox's offer of half-price service for six months in that neighborhood, Qwest must provide seven-days public notice.[11] This would allow Cox, and everyone else, to further change their prices before

[6] Qwest documented in its petition the myriad of ways it makes xDSL services available to CLECs and ISPs (*see, e.g.*, petition at 3-4). These include providing raw copper loops to CLECs as unbundled network elements ("UNEs") and providing DSL over the UNE-P. Qwest has also entered into commercial agreements, such as the line-sharing agreement with Covad on and the trail-blazing development of the Qwest Platform Plus ("QPP") to replace UNE-P. Qwest's QPP innovation is another instance showing that Qwest treats competitors as another distribution channel to keep traffic "on net."

[7] *In the Matter of Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area and Policy and Rules Concerning the Interstate, Interexchange Marketplace, Second Report and Order in CC Docket No. 96-149 and Third Report and Order in CC Docket No. 96-61*, 12 FCC Rcd 15756, 15762-63 ¶ 6 (1997) ("*LEC Classification Order*").

[8] *Id.*

[9] Petition at 10 and its associated Declaration of Rick MacInnes.

[10] FISPA at 18.

[11] 47 C.F.R. § 61.58. The advance notice requirements relate to price decreases, not just price increases as suggested by CompTel/ASCENT. *See* Opposition of Comptel/Ascent, WC Docket No. 04-416, filed Jan. 5, 2005 at 11 ("CompTel/ASCENT").

Qwest's price change, since Qwest's competitors do not have to give prior notice of price changes. Nor do they have a waiting period between price changes.

Second, rate averaging would require Qwest to offer the half-price services throughout the state, not just the neighborhood that Cox had targeted.[12] Again, Qwest's competitors, not just cable modem providers, could target their promotions to the particular neighborhood.

Finally, Qwest would have to sell xDSL at an avoided cost discount off the promotional offer of half price because the promotion would be in effect for more than 90 days.[13] Again, Qwest would end up offering an avoided cost discount off the half-price promotion throughout the state, not just in the neighborhood where Cox made its targeted offer. At the same time, the resellers, if they chose to offer any promotions at all, could target their promotions to the neighborhood where Cox lowered its prices, and sell at their full price everywhere else. As this simple example shows, the regulations from which Qwest seeks forbearance hamper price competition in the broadband market.

In the months since Qwest filed its petition, a couple of things have happened that show that a thriving wholesale broadband transmission market is developing. First, MCI has signed an agreement in which it purchases wholesale cable modem services from Comcast, Cox and Time Warner Cable.[14] In its press release MCI brags that as a result of the deal MCI can now reach 90 percent of all U.S. businesses.[15] Nonetheless, in opposition to Qwest's forbearance petition MCI

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[12] 47 C.F.R. § 69.3(e)(7).

[13] 47 C.F.R. § 51.613(a)(2).

[14] Press Release, MCI Adds Cable to Internet Broadband Mix (Tuesday January 11, 2005) (http://biz.yahoo.com/prnews/050111/nytu086_1.html?printer=1).

[15] *Id.*

complains that there is insufficient competition in the wholesale market,[16] and characterizes cable modem as competing in the residential market.[17]

Second, Eschelon, which, in opposition to Qwest's petition complains that it needs DSL at an avoided cost discount, and can only get xDSL at an avoided cost discount pursuant to Section 251(c) and Section 271,[18] has signed a QPP contract with Qwest. In that contract Qwest agrees to sell Eschelon xDSL at an avoided cost discount of 18% to the extent that xDSL is not otherwise available at an avoided cost discount in an interconnection agreement between Qwest and Eschelon. These developments show the wisdom in the Commission's prior decisions not to view the broadband market as a static one, but to recognize that the market is still a developing one.

1. Contrary To The Arguments Of Some Commenters, Qwest Will Still Be Subject To Significant Title II Regulation If The Commission Grants Qwest's Petition

It seems that some commenters may be confusing Qwest's petition with BellSouth's forbearance petition.[19] There are numerous comments from consumers, and even some from carriers and ISPs, asking the Commission to deny Qwest's petition because these commenters understand that Qwest is seeking to take away consumer's ability to choose their own ISP. Qwest will still be subject to significant regulation even if the Commission grants Qwest's petition. If the Commission grants Qwest's petition, Qwest will still be subject to the *Computer Inquiry* requirement to treat unaffiliated ISPs in a non-discriminatory manner. Moreover, as

[16] Opposition of MCI, Inc., WC Docket No. 04-416, filed Jan. 6, 2005 at 2-6 ("MCI").

[17] *Id.* at 2.

[18] *See* Comments of Eschelon Telecom, Inc., WC Docket No. 04-416, filed Jan.5, 2005 at 4 ("Eschelon").

[19] *See*, Petition of BellSouth Telecommunications, Inc. For Forbearance Under 47 U.S.C. § 160(c) From Application of *Computer Inquiry* and Title II Common-Carriage Requirements, WC Docket No. 04-405, filed Oct. 27, 2004.

shown by the customer comments, many mass-market broadband customers that have chosen Qwest care about ISP choice. They have informed us that limiting their choice would eliminate a reason for these consumers to choose Qwest over a competitor.

In addition to the *Computer Inquiry* rules, Qwest would still be subject to Title II. Even in the absence of dominant carrier regulation -- indeed, even in the absence of the obligations imposed on incumbent LECs under Section 251 -- Qwest, like all carriers, will remain obligated to offer services at rates, terms and conditions that are just, reasonable, and non-discriminatory.[20] This provision, on which the Commission has relied for years to ensure that all carriers provision services in a fair and just manner, is sufficient to ensure that Qwest's customers and rivals police -- and the Commission swiftly addresses -- any unjust, unreasonable or discriminatory actions -- thereby reducing Qwest's ability to influence even the intramodal market for xDSL services.[21]

A number of commenters that oppose Qwest's petition complain that granting the petition would harm unaffiliated ISPs. This is clearly not the case because of the *Computer Inquiry* requirements and the mandates of Title II. Moreover, it is important to note that the approximately 400 unaffiliated ISPs that use Qwest's DSL Host service have chosen to have their customers buy xDSL transmission out of Qwest's retail tariff. Accordingly, their customers would directly see the benefits of increased price competition resulting from granting Qwest's petition. That is, those customers are buying out of the same xDSL transmission tariff as customers who buy Qwest's bundle of xDSL transmission and Internet access. If the

[20] 47 U.S.C. §§ 201(b), 202(a).

[21] Thus, FISPA is incorrect that Qwest seeks the freedom to act in a discriminatory and unreasonable manner. *See, e.g.,* FISPA at i (Qwest seeks "freedom to act in a discriminatory and unreasonable manner"), ii (Qwest seeks "relief from the duties to be reasonable and nondiscriminatory").

Commission grants this petition, thereby allowing Qwest to engage in more price competition on xDSL, the customers of those DSL Host ISPs will also get the benefit of those promotions,

Other safeguards for intramodal competitors include the fact that Qwest's "bulk" xDSL service would remain subject to the dominant carrier tariff regime, Qwest would still be subject to the Section 251(b) duty to resell, and Qwest would continue to provide naked DSL and DSL Host service. Accordingly, granting Qwest's petition will not harm Qwest's intramodal competitors.

B. Qwest's Petition Meets The Requirements Necessary To Justify Forbearance

A number of commenters have challenged the legal sufficiency of Qwest's petition by mischaracterizing the requirements necessary to justify forbearance. They claim that: 1) a fully competitive wholesale market is a mandatory precursor to forbearance; 2) the Commission's decision that cable modem is not a telecommunications service means that the Commission cannot consider competition from cable modem service in ruling on Qwest's petition; 3) forbearance is unwarranted because cable modem does not serve business customers; 4) the Commission cannot forbear from resale at the avoided cost discount because Sections 251(c) and 271 have not been fully implemented; 5) Qwest's market-share data do not support forbearance; and 6) forbearance is a last resort requiring heightened standards of proof. Qwest addresses each argument in turn.

1. A Fully Competitive Wholesale Market Is Not A Mandatory Precursor To Forbearance

A number of commenters assert that the Commission must consider the state of competition in the wholesale xDSL market before deciding whether to grant Qwest's retail forbearance petition.[22] These commenters are willfully ignoring the Commission's prior decisions and the relevant judicial precedent. The Commission has already rejected, in the *Section 271 Forbearance Order*, the argument that a fully competitive wholesale market is a mandatory precursor to a finding that Section 10 is fully satisfied, regardless of the state of intermodal competition in the retail market and the effects on incumbent LEC investments.[23]

FISPA inaccurately characterizes Qwest "as the sole source provider[ ] of the access tools required by [its] competitors to reach end user customers."[24] FISPA ignores all of Qwest's facilities-based competitors, who self provide and do not at all use Qwest's "access tools" to reach end-user customers. To the extent that the Commission considers the wholesale market it cannot ignore that cable providers, and other facilities-based competitors, are part of the relevant market. In response to competitive pressures they too can sell at wholesale.

Including cable modem and other facilities-based providers in the market is consistent with antitrust analysis. The *Horizontal Merger Guidelines*: "[I]dentification of firms that participate in the relevant market begins with all firms that currently produce or sell in the relevant market. This includes vertically integrated firms to the extent that such inclusion accurately reflects their competitive significance in the relevant market[.]"[25] Professor Areeda's antitrust treatise also teaches that self-suppliers that can easily switch production to provide service at wholesale must be considered part of the relevant market.[26] As a matter of simple

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[22] *See, e.g.,* AT&T at 22-26, CompTel/ASCENT at 13-16, EarthLink at 13; Information Technology Association at 6.

[23] *Section 271 Forbearance Order*, 19 FCC Rcd at 21509-10 ¶ 28.

[24] FISPA at i.

[25] United States Dept. of Justice and Federal Trade Commission, *Horizontal Merger Guidelines* § 1.31 (Apr. 8, 1997) (http://www.ftc.gov/bc/docs/horizmer.htm; visited on Feb. 7, 2005).

[26] *See, e.g.,* 2A Phillip E. Areeda*, et al., Antitrust Law* at 81-82 ¶ 423 (Aspen Publishers, Inc. 2002).

economics, a company hoping to monopolize an industry cannot raise prices to monopoly levels because the supracompetitive price may induce the vertically integrated firm to supply others in direct competition with the would-be monopolist.[27] Judge Learned Hand applied the same principles in the *Alcoa* case where the issue was whether Alcoa had unlawfully monopolized the market for aluminum ingot. There the court included all of Alcoa's aluminum ingot production in the relevant market, regardless of whether Alcoa sold the production at wholesale or used the ingot as an input in fabricating products itself.

The Commission applied these market definition principles in its analysis of the long distance market in connection with the AT&T/McCaw merger. The Commission rejected the argument that there was a separate market comprised of long distance carriers that served wireless customers. The Commission defined the relevant market to include all long distance carriers, including those providing only wireline long distance service, since these carriers could easily serve wireless customers in the future even if they were not doing so at the time of the analysis.[28] The D.C. Circuit upheld the Commission stating that "whatever market definition is employed, relative ease of entry by other firms should always be taken into account. The one course that would be clearly wrong would be to define the market as A alone while ignoring the ease of entry from B producers."[29]

This approach to market definition is consistent with analysis of the unbundling rules under Section 251. The Supreme Court decided that the Commission cannot "blind itself to the

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[27] *Id.* at 226 ¶ 535e.

[28] *In re Applications of Craig O. McCaw and American Telephone and Telegraph Company*, *Memorandum Opinion and Order*, 9 FCC Rcd 5836, 5846-47 ¶¶ 13-14 (1994).

[29] *SBC Communications Inc. v. FCC*, 56 F.3d 1484, 1493 (D.C. Cir. 1995), citing Phillip E. Areeda, Herbert Hovenkamp & John L. Solow, IIA Antitrust Law 252, 257 (1995).

availability of elements outside the incumbent's network."[30] The Commission has followed this precedent in the context of evaluating whether competitors would be "impaired" without access to an incumbent's network, deciding that:

> [B]asing the 'impair' standard on the existence of a wholesale market does not take into consideration self-provisioning as a viable substitute to the incumbent LECs' network elements. . . . We find that, in order to thoroughly evaluate the availability of alternative elements outside of the incumbent LEC's network, we must consider elements available from all sources, including those elements available from third-party suppliers and through self-provisioning.[31]

Similarly, the D.C. Circuit has mandated in the Section 251 context the Commission cannot ignore intermodal alternatives when evaluating wholesale unbundling obligations.[32] For example, in *USTA I* the D.C. Circuit vacated the *Line Sharing Order* because the Commission "failed to consider the relevance of competition in broadband services coming from cable (and to a lesser extent satellite)."[33]

These authorities, precedents and prior decisions mean that the Commission must consider cable modem, and other facilities-based providers, as part of the wholesale broadband market. Cable operators have the ability to use their capacity to provide services at wholesale. Therefore, they constrain the behavior of competing DSL providers that do sell at wholesale. The fact that the cable operators use their transmission facilities for their own broadband services and that the facilities often do not reach the wholesale market is not relevant. Such facilities still

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[30] *AT&T Corp. v Iowa Utils. Bd.*, 525 U.S. 366, 389 (1999).

[31] *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, *Third Report and Order and Fourth Further Notice of Proposed Rulemaking*, 15 FCC Rcd 3696, 3727 ¶ 56 (1999), *pets. for review granted, United States Telecom Ass'n v. FCC,* 290 F.3d 415 (D.C. Cir. 2002) ("*USTA I*"), *cert. denied*, 538 U.S. 940 (2003).

[32] *USTA II*, 359 F.3d 554, 572-73 (D.C. Cir. 2004), *cert. denied*, 125 S.Ct. 313 (2004); *USTA I*, 290 F.3d at 428.

[33] *USTA I*, 290 F.3d at 428.

have an impact on the wholesale broadband market. Moreover, the Commission has repeatedly refused to take a static view of the broadband market.[34] As the market develops there may be more agreements where cable modem providers agree to sell their services at wholesale, like the agreement that MCI recently announced. Accordingly, the Commission should reject the arguments that it cannot forbear due to the state of the wholesale market.

AT&T has suggested that the Commission condition any relief on forcing Qwest to comply with certain conditions, most of which have absolutely no correlation with the request that Qwest is seeking.[35] AT&T needs to file a petition for rulemaking if it seeks such rules. The Commission should reject them without any further analysis. A few of the suggested conditions do pertain to the relief that Qwest is seeking, but these are unnecessary attempts to further regulate the prices that Qwest charges for retail and wholesale xDSL.[36] These conditions are unnecessary because market forces will discipline Qwest's behavior towards its intramodal rivals.

Qwest's opponents argue that the Commission "must ensure that competitive carriers have an option to provide competing xDSL service."[37] Of course, even if the Commission grants Qwest's petition, CLECs will still have the option of providing competing xDSL service by

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[34] *See Section 271 Forbearance Order*, 19 FCC Rcd at 21510 ¶ 29.

[35] These conditions would forbid Qwest from blocking access to particular broadband services and applications; prevent Qwest from giving any kind of preferential access to its own broadband services and applications or from degrading access to its rivals' broadband services and applications; and mandate that Qwest offer naked DSL. AT&T at 29-30.

[36] The first is to offer wholesale mass-market xDSL transmission to retail competitors subject to dominant carrier tariff regulation, including cost support requirements for every xDSL retail mass-market offer that Qwest makes available to end users. The second is to mandate that Qwest impute the cost of its wholesale DSL service into any DSL service that Qwest makes available to end users at retail. AT&T at 29-30.

[37] *See* Comments of the Association for Local Telecommunications Services, WC Docket No. 04-416, filed Jan. 5, 2005 at 5 ("ALTS").

obtaining network elements under Section 251. Moreover, CLECs can enter into private contracts with Qwest (as Eschelon did), cable modem providers (as MCI did) or other facilities-based competitors.[38] In any event, Congress did not pass the Telecommunications Act of 1996 in order to guarantee that all competitive carriers would succeed in all markets.

2. The Commission's Determination That Cable Modem Is Not A Telecommunications Service Does Not Mean The Commission Cannot Consider Competition Between Cable Modem And xDSL When Ruling On Qwest's Petition

Ignoring the prior Commission decisions and judicial precedent that clearly consider competition from cable modem service when assessing Sections 251 and 271 obligations in the broadband market, EarthLink asserts that because the biggest competitor to Qwest's xDSL service is cable modem service, which the Commission has decided is not a telecommunications service, the Commission can only look at the competition from CLECs.[39] According to EarthLink the Commission cannot look at the effects of competition between xDSL and cable modem service when looking at the third forbearance criteria, the public interest.[40] The existence of cable modem service means that the xDSL providers face broadband competition, even if that competition does not fall within the telecommunications service bucket. No matter the regulatory bucket into which cable modem is placed, cable modem is a substitute for xDSL. Thus, the availability of cable modem affects the retail and wholesale behavior of Qwest and

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[38] Press Release, MCI Adds Cable to Internet Broadband Mix (Tuesday January 11, 2005) (http://biz.yahoo.com/prnews/050111/nytu086_1.html?printer=1).

[39] Comments of EarthLink, Inc. in Opposition to the Petition, WC Docket No. 04-416, filed Jan. 6, 2005 at 12 ("EarthLink").

[40] *Id.*

other xDSL providers.[41] Accordingly, in the *Section 271 Forbearance Order* and when evaluating Section 251 requirements, the Commission and the courts have considered relevant the competition from all providers, especially cable modem, the dominant provider. The Commission should reject EarthLink's argument.

3. The Commission Should Reject The Argument That Forbearance Is Unwarranted Because Competitors Purportedly Fail To Serve Business Customers

Trying to find a space where intermodal providers do not participate, a number of commenters assert that the Commission should not grant Qwest's petition because, according to their supposition, cable providers tend not to serve business customers.[42] Again, these commenters ignore a prior Commission decision. The Commission rejected this argument in the *Section 271 Forbearance Order* and it should do so again here. In the *Section 271 Forbearance Order* the Commission concluded that CLECs can still obtain access to network elements under Section 251 to serve business customers, and that there is actual and potential intermodal competition from other services.[43]

Factually, the Commission's most recent High Speed Services Report indicates that cable modem provides control a majority of all residential *and small-business* high-speed and advanced services lines.[44] Some commenters assert that cable modem does not sell to all small-business because it cannot reach small business in non-residential areas. The facts do not bear

[41] Similarly, even though Voice Over Internet Protocol ("VoIP") may not be a telecommunications service, everyone agrees that it is a competitor to Plain Old Telephone Service ("POTS").

[42] *See, e.g.,* Eschelon at 15; CompTel/ASCENT at 6.

[43] *Section 271 Forbearance Order*, 19 FCC Rcd at 21505-07 ¶ 22 & n.69.

[44] Industry Analysis and Technology Division, Wireline Competition Bureau, *High Speed Services for Internet Access: Status as of June 30, 2003* at Tables 3 & 4 (Dec. 2004) ("*High-Speed Services Report Dec. 2004*").

this out. MCI's recent deal with Comcast, Cox and Time Warner Cable allows MCI to reach 90 percent of all U.S. business locations.[45] At the end of the first quarter 2004, Time Warner Cable's Road Runner Business Class had more than 139,000 commercial customers.[46] Cox offers a suite of services, including cable modem service, aimed at small business customers.[47]

Realizing that cable modem does sell to small business, other commenters feign concern for mid-sized to large business xDSL customers.[48] This is not a realistic concern. While Qwest would love to sell xDSL to mid-sized and large businesses, Qwest has found that businesses with more than five seats per location tend to buy T-1s, or other broadband services, rather than DSL. The economics generally do not justify buying DSL for a larger business. Nonetheless, to the extent that mid-sized and large businesses want xDSL or cable modem, services traditionally associated with consumers and small business, perhaps for remote locations, cable modem providers are participating in this market. For example, Time Warner Cable has announced the launch of two packaged broadband networking solutions developed specifically for large commercial customers, and targeting home office workers and remote locations.[49] Cox has also launched services aimed at large commercial customers.[50] Accordingly, the Commission should

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[45] *See* notes 13 & 14 *supra*.

[46] Press Release, Road Runner Business Class Further Penetrating Growing Business Market With Customized Offerings Time Warner Cable Introduces New Enterprise Solutions for Largest Companies (July 8, 2004).

[47] Press Release, Cox Business Services Answers Call For Flexible Telecommunication Solutions For Small Businesses (April 5, 2004) (http://www.coxbusiness.com/pr/04-0405.html).

[48] *See, e.g.*, Opposition of Computer Office Solutions, Inc., WC Docket No. 04-416, filed Jan. 6, 2005 at 10.

[49] Press Release, Road Runner Business Class Further Penetrating Growing Business Market With Customized Offerings Time Warner Cable Introduces New Enterprise Solutions for Largest Companies (July 8, 2004).

[50] Press Release, Enterprise Presents Even 'Bigger' Opportunity For Cox Business Services In 2004 (March 29, 2004) (http://www.coxbusiness.com/pr/04-0329.html).

reject the argument that it cannot forbear from regulation of xDSL out of concern for the business market and grant forbearance, just as it did in the *Section 271 Forbearance Order*.[51]

4. Sections 251(c) And 271 Have Been Fully Implemented

A number of commenters argue that Sections 251(c) and 271 have not been fully implemented, and thus the Commission does not have legal authority to forbear from the avoided cost discount resale under Sections 251(c) and 271.[52] These parties argue that the Commission should adopt a market-based test and only find section 271 "fully implemented" when wholesale xDSL markets are deemed competitive.[53]

This argument reflects a willful ignorance of the Commission's prior decisions, in particular the *Section 271 Forbearance Order*,[54] in which the Commission rejected the argument. There the Commission decided that checklist portion of Section 271(c) is fully implemented once Section 271 authority is obtained in a particular state.[55] Since Qwest has obtained Section 271 authority in all of its states the checklist requirements of Section 271(c) are fully implemented for purposes of Section 10(d) throughout Qwest's 14-state region.[56] The Commission clearly decided that Section 10(d) provides a threshold standard forbidding the Commission from granting forbearance until the Commission has determined that the BOC satisfies the Section 271(c) competition checklist.[57] While the *Section 271 Forbearance Order*

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[51] *Section 271 Forbearance Order*, 19 FCC Rcd at 21505-07 ¶ 22 & n.69.

[52] *See, e.g.,* FISPA at 31.

[53] *See, e.g., id.*

[54] *Section 271 Forbearance Order*, 19 FCC Rcd at 21503-04 ¶¶ 14-17.

[55] *Id.* at 21503 ¶ 15.

[56] *Id.*

[57] *Id.* at 21503-54 ¶ 17.

did not consider forbearance from Section 251(c), there is no reason to treat Section 251(c) differently than Section 271(c).

5. Qwest's Market Share Data Support Its Claim For Forbearance

Some commenters claim that xDSL on a whole, not just Qwest xDSL, leads cable modem in share in some states, therefore the petition must be denied.[58] Then, they bootstrap that into a claim "Qwest's ADSL market share is greater than cable."[59] In a related argument other commenters claim that the existence of satellite, wireless and broadband over power line must be ignored because nationally these platforms account for a small percentage of mass-market xDSL.[60] These arguments have about as much merit as FISPA's assertion that California is in Qwest's territory.[61]

As shown in the Table, Qwest's ADSL market share is below that of cable in all of Qwest's states where cable modem lines are reported. In no state where cable modem lines are unreported does Qwest have even [Redacted] of the total high speed lines. In South Dakota the share of the supposedly "not viable" and "generally unacceptable"[62] "Other" providers exceed Qwest's share of mass-market broadband.[63] As of June 30, 2004, Qwest averaged a [Redacted]% share of mass-market broadband in its 14-states.[64]

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[58] FISPA at 10.

[59] *See id.*

[60] *See, e.g.*, MCI at 3.

[61] FISPA at 10.

[62] *Id.* at 15.

[63] *See* Table at Attachment B; *also compare* Reply Declaration of Rex Morse (attached hereto as Attachment A) at ¶ 5 with *High Speed Services Report* at Table 7.

[64] *Id.*

6. The Commission Should Reject The Arguments That Misstate The Forbearance Standard

A few commenters have advanced arguments that attempt to raise the bar on the statutory forbearance standard. Covad assets that forbearance will not incent deployment because it pertains to a service provided over existing legacy loop facilities, as opposed to new fiber facilities.[65] Covad seems to argue that the Commission should regulate old facilities, with the old rules, and reserve less onerous rules for fiber facilities. The forbearance standard is not driven by the facilities over which the service is provided. Rather, it pertains to the market in which the services are sold, and whether regulation is necessary to achieve the Commission's statutory goals. Granting forbearance according to the facilities used to deliver a service would badly skew incentives by incenting deployment based not on the most efficient technology for a given situation, but rather based upon the technology with the most favorable regulatory regime.

Similarly, FISPA asserts "forbearance should be used as a last resort and then, only if the case for forbearance is supported by irrefutable facts and evidence."[66] This is not the correct standard. The statute does not say that forbearance is a last resort. Rather, it is a response to market conditions rendering regulation unnecessary. Nor does the statute raise the evidentiary standard for forbearance any higher than that used for any other Commission decision.

C. Dominant Carrier Tariff Rules

The traditional economic justification for the dominant carrier tariff scheme is that without such regulation carriers with pricing power over their end users will price their services above efficient levels. The goal of the Commission's regulation, therefore, is to allow the carrier to "recover its reasonable expenses and a fair return on its investment through the rates it charges

[65] Opposition of Covad Communications, WC Docket No. 04-416, filed Jan. 5, 2005 at 6-8

[66] FISPA at 4.

its customers."[67] In its petition Qwest demonstrated that its request for forbearance from dominant carrier tariff regulation meets the statute's three-prong test.

No one denies that dominant carrier tariff rules reduce price competition between Qwest and other providers. The commenters concede that there are facilities-based providers, such as cable modem providers, that do not rely at all upon Qwest's facilities in order to provide broadband access to their end users. Even the commenters that oppose Qwest's petition do not deny that cable modem and other intermodal competitors have made significant sunk investment in facilities.

1. Dominant Carrier Tariff Rules Are Not Necessary To Ensure, Just Reasonable And Non-discriminatory Rates, Terms And Conditions

Qwest argued that vigorous intermodal competition will ensure just, reasonable and non-discriminatory rates, terms and conditions, thereby rendering dominant carrier tariff rules unnecessary. Some commenters argue that without dominant carrier tariff rules Qwest could impose a price squeeze.[68] Others oppose on the grounds that Qwest has not demonstrated that every single xDSL customer has a choice of providers, and has not shown that cable modem is ubiquitous.[69] EarthLink opposes on the grounds that Qwest has not shown that rates and terms to unaffiliated ISPs will remain just, reasonable, and non-discriminatory. Another commenter complains that competitors benefit from prior notice of Qwest's price changes.[70]

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[67] *Louisiana PSC v. FCC*, 476 U.S. 355, 364-65 (1986).

[68] *See, e.g.,* AT&T at 13.

[69] CompTel/ASCENT at 10.

[70] EarthLink at 8-9,

a. The argument that Qwest may engage in a price squeeze is not economically rational

The complaint that Qwest may engage in a price squeeze if the Commission forbears from dominant carrier tariff rules is economically implausible. These commenters complain that this could harm unaffiliated ISPs. For example, the commenters fear that Qwest may not lower prices on "bulk" DSL sold to nonaffiliated ISPs, resulting in a price squeeze. This complaint is economically implausible.

It is undisputed that Qwest faces significant intermodal, facilities-based competition. In order to effectuate a price squeeze, a company must be a monopolist, which Qwest clearly is not. Accordingly, as an economic matter, it is unlikely that even if Qwest could force one of its competitors out of the market by temporarily raising that competitor's input costs and decreasing its own prices, Qwest could then raise prices in the broadband market to anti-competitive levels. To begin with, for this to occur, Qwest would have to succeed in pushing out all its competitors. This would be highly unlikely given that in most cases Qwest's intermodal rivals have little if any dependence on any Qwest services or facilities, in which case it would be impossible for Qwest to disadvantage rivals by charging higher prices, providing them with poor quality interconnection, or charging higher prices, or imposing unnecessary delays, or raising their costs.[71] Accordingly, merely pushing one -- or even one group -- of rivals out of the market would ultimately not permit Qwest to raise prices: the remaining competitors would be poised to win over Qwest's customers as soon as Qwest raised prices, by undercutting Qwest's new supra-competitive rates.

Furthermore, because, as even the opponents concede, so many of Qwest's competitors have made a significant sunk investment in their own facilities, it is highly unlikely that Qwest

[71] *See, e.g.*, ALTS at 3.

could eliminate them as potential competitors even if it managed to force them from the market temporarily. For example, were Qwest able somehow to force its cable modem competitor from the broadband market altogether (though obviously not from the cable television market), the cable provider could quickly re-enter the cable modem market as soon as Qwest attempted to raise prices above competitive levels. The cable operator's cable modem facilities presumably would remain in place in the cable system, ready to be used for renewed competition as soon as Qwest's higher rates provided an attractive profit margin. In the *LEC Classification Order*, the Commission considered this a sufficient protection from potential "leverage"-based market power even if the interexchange carrier ("IXC") might leave the market altogether: as the Commission noted, "the facilities of that [IXC] would remain intact, ready for another firm to buy at distress sale prices."[72]

It is not necessary to distinguish between markets in which intermodal competition does not yet exist and those where it does with respect to whether Qwest might be able to leverage its purported local market power into the broadband market. Cable facilities are ubiquitous across Qwest's 14 states, and, where the profit margins are sufficient -- as they would be if Qwest tried to price its broadband services above "competitive levels" -- there is little to prevent cable operators from upgrading their plant to provide cable modem services. Thus, even where cable providers have not yet added cable modem facilities, the cable provider should be considered a part of the relevant market.

Qwest's mass-market broadband services competitors -- cable modem, satellite, and wireless broadband providers -- typically do not use the Qwest's facilities or services at all in connection with their broadband services. Thus, there is not even a theoretical possibility that

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[72] *LEC Classification Order*, 12 FCC Rcd at 15814-15 ¶ 102.

Qwest could subject them to a price squeeze. Accordingly, even if Qwest managed to raise prices for intramodal competitors, and force them out of the market, there would be no reason for Qwest to believe that any customers that left the intramodal competitors would turn to Qwest, rather than turning to the facilities-based, intermodal competitors.

FISPA also worries that Qwest will "cross-subsidize its broadband services with its still dominant monopoly revenues derived from its lock on local exchange services, enhanced by its bundling of long distance services."[73] Again this threat is implausible given the panoply of state and federal regulatory constraints that apply to incumbent LECs' basic services. Dominant carrier regulation of xDSL ultimately accomplishes little or nothing in this regard. Accordingly, Qwest would be unable to affect competition in the broadband services market through the practices that the commenters prophesy.[74]

b. Qwest need not show that each and every customer premise has access to cable modem service

Others oppose on the grounds that Qwest has not demonstrated that every xDSL customer, or potential xDSL customer, has a choice of providers, and has not shown that cable modem is ubiquitous.[75] The Commission did not wait until xDSL deployment or other platforms were ubiquitous before deciding that cable modem service need not be subject to all of Title II regulation. Rather, in deciding the regulatory regime for cable modem service, the Commission recognized that the market was still developing and that additional services were still in the

[73] FISPA at iii.

[74] Moreover, it is bewildering that FISPA worries about the price of xDSL going down. If the price of xDSL went down, then more people would buy xDSL and Internet access along with the transmission. It follows then that FISPA members could actually benefit from lower xDSL prices.

[75] CompTel/ASCENT at 10.

process of being deployed. It would be irrational of the Commission not to apply the same recognition in the context of xDSL services.

c. Market forces and remaining Commission regulation will ensure that prices to unaffiliated ISPs remain just and reasonable

EarthLink opposes on the grounds that Qwest has not shown that rates and terms to unaffiliated ISPs will remain just, reasonable, and non-discriminatory.[76] Qwest is not, however, seeking to change the way it does business with unaffiliated ISPs. Having 400 ISPs available is a critical channel for Qwest. The unaffiliated ISPs may either have their customers buy out of the retail tariff or the ISPs may buy out of the "bulk" tariff themselves. Moreover, as shown above in Section II.B.1., even though cable modem providers often do not sell at wholesale, their mere presence in the market disciplines Qwest and other xDSL wholesale providers. Finally, as shown above in Section II.A.1., remaining regulation will also ensure that prices to unaffiliated ISPs remain just, reasonable, and non-discriminatory.

d. The prior notice provisions of dominant carrier tariff rules decrease price competition

Commenters also complain that competitors will be disadvantaged without prior notice of Qwest's retail price changes.[77] Dominant carrier tariff rules such as the advanced notice provision are not intended to give advantages to competitors. Rather, they are intended to ensure fair and reasonable rates in a market, unlike the one for mass-market broadband, in which there are no competitors. These commenters simply add force to Qwest's argument that forbearance from dominant carrier tariff rules is in the public interest because such rules decrease price

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[76] EarthLink at 9.

[77] *Id.* at 8-9.

competition. Accordingly, the rules may encourage all providers to maintain rates at an artificially high level.

In sum, Qwest does not have the monopoly power necessary to engage in a price squeeze. The presence of intermodal competitors and the remaining Title II and *Computer Inquiry* regulations will protect ISPs and other entities that buy wholesale xDSL. Qwest has demonstrated that dominant carrier tariff rules are not necessary to ensure that rates, terms, and conditions just, reasonable and not unreasonably discriminatory.

2. Dominant carrier tariff rules are not necessary to protect consumers

In its petition Qwest demonstrated that consumers neither know nor care whether their provider is subject to dominant carrier tariff restrictions. If Qwest attempts to use freedom from such regulations to harm consumers, the consumers will simply turn to other providers.

Commenters that oppose Qwest's petition argue that Qwest could restrict competition in the wholesale market. Qwest has refuted this argument above in Section II.B.1. Commenters also argue that business is dependent on xDSL. Qwest has refuted this argument as well in Section II.B.3., above. Finally, they argue that intermodal competitors are not ubiquitous. Qwest has refuted this argument in Section II.C.1.b. In sum, dominant carrier tariff regulations are not necessary to protect consumers.

3. Dominant carrier tariff rules are not in the public interest

Qwest has shown that dominant carrier tariff rules are not in the public interest because they result in decreased price competition and may encourage all providers to maintain artificially high rates. Opponents do not deny Qwest's argument. In fact, as shown above, CLECs want to keep this regulation because advance notice of Qwest's price changes benefits CLECs. EarthLink argues that dominant carrier tariff rules were enacted primarily for the benefit of CLECs and their customers.[78] This is clearly untrue. Dominant carrier tariff rules predate CLECs, but are the offspring of the Commission's regulation in a time when telecommunications were considered a natural monopoly.

Finally, opponents argue that regulatory parity is not in the public interest because the telephone system and cable originated with different architectures and the Telecommunications Act of 1996 treats the two technologies differently.[79] While cable may have originated as a one-to-many form of communication, cable systems have been modified to provide for one-to-one communication of broadband transmission, not to mention that some systems have been modified to provide POTS. Accordingly, the regulatory silos are beginning to blur. It would be irrational for the Commission not to forbear to hang on to the Act's regulatory silos when some of the technological differences between the telephone system and cable systems are being erased. In sum, forbearance from dominant carrier tariff regulations is in the public interest.

D. Rate Averaging

No commenter argues that consumers who see price decreases within a state would be harmed by the end of rate averaging. Nor do any of the commenters deny that rate averaging serves as a pricing umbrella for Qwest's competitors. Nor has anyone refuted that relatively higher broadband prices in rural markets may stimulate other providers to enter those markets.

1. Rate averaging is not necessary to ensure, just reasonable and non-discriminatory rates, terms and conditions

Qwest argued that cable modem's market share demonstrates that consumers can find just, reasonable, and not unreasonably discriminatory rates from providers who are not required

[78] EarthLink at 12.

[79] Commenters cannot agree on whether cable has competition. AT&T says "yes." AT&T at 20. Covad says cable is a "historically monopoly" industry "with established patterns of anticompetitive behavior." Covad at 4.

to average their rates. Qwest has also shown that customers would switch providers if it used freedom from the rate averaging requirement to charge unreasonable rates.

In opposition, Eschelon argues that resellers would be harmed if the Commission decided to forbear from the requirement of averaged rates because the percentage wholesale discount would be applied to a lower retail rate.[80] Eschelon's concerned that retail rates might be lower is further proof of Qwest's public interest argument that elimination of rate averaging will be beneficial to competition. One goal of the competition provisions of the Telecommunications Act of 1996 is to let customers benefit from lower rates. The goal is not to create a protected class of competitors who are to benefit at the expense of end users.

Opponents query whether ending rate averaging would be "fair" to rural consumers. The Commission should reject this argument. As stated above, the market is still evolving. New facilities-based competitors are still bringing their products to market. Rural markets in particular may be well-suited to the developing wireless platforms as spectrum tends to be less congested in rural areas. Opponents also complain about the possibility of a price squeeze,[81] a possibility which Qwest has refuted above in Section II.C.1.a. In sum, rate averaging is not necessary to ensure that rates are just, reasonable and not unreasonably discriminatory.

2. <u>Rate Averaging Is Not Necessary To Protect Consumers</u>

The Commission has previously decided that deaveraging would not permit a LEC such as Qwest to charge unreasonable, monopolistic rates even where the LEC does not face competition.[82] The Commission need not reconsider that decision. Commenters opposing

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[80] Eschelon at 16-17.

[81] *See, e.g.*, AT&T at 14.

[82] *In the Matter of Multi-Association Group (MAG) Plan for Regulation of Interstate Services* of *Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers, Federal-State*

Qwest's requested relief on rate averaging argue that rate averaging is necessary to protect consumers who purportedly would be left with a duopoly at best. The Commission considered similar arguments in the *MAG Order* and concluded that averaging was not necessary. It should apply the same analysis here.

3. Rate Averaging Is Not In The Public Interest

Qwest has shown that forbearance from rate averaging would enhance competition and promote broadband deployment, both by Qwest and by competitors. Rate averaging, like dominant carrier tariff rules, creates a price umbrella for competitors. Deaveraged rates may encourage Qwest and other competitors to deploy in rural and underserved markets. While opponents quibble about whether deaveraging rates will encourage Qwest to deploy further, even the opponents have not denied that rate averaging creates a price umbrella and that deaveraged rates may encourage other competitors to deploy in rural and underserved markets.

E. Resale At An Avoided Cost Discount

Qwest would like to negotiate commercial contracts with its carrier customers. While none of Qwest's competitors are legally required to resell at an avoided cost discount, this does not justify the continued imposition of the resale requirement on Qwest.

1. Avoided Cost Resale Is Not Necessary To Ensure Just, Reasonable And Non-Discriminatory Rates, Terms And Conditions

Qwest's provision of resale at an avoided cost discount is not necessary to ensure just, reasonable and non-discriminatory rates, terms and conditions for either retail or wholesale broadband transmission. In the retail space, Qwest's relative position will not lead to unreasonable or discriminatory practices in the absence of a Section 251 or 271 obligation to

Joint Board on Universal Service, Report and Order and Second Further Notice of Proposed Rulemaking, 19 FCC Rcd 4122, 4135-36 ¶ 28 ("*MAG Order*").

resell. The Commission has previously decided, and the D.C. Circuit has affirmed, that robust intermodal competition from cable modem ensures just, reasonable and non-discriminatory rates, terms and conditions in the retail space.

In the wholesale space, Qwest has shown that competition from intermodal providers will pressure Qwest to utilize wholesale customers as an avenue to grow its share of broadband markets. Thus, Qwest will offer such customers reasonable rates and terms in order to retain their business. Opponents of Qwest's petition argue that Qwest has no incentive to fairly negotiate private contractual arrangements with its competitors.[83] These commenters ignore Qwest's history of negotiating private contractual arrangements. For example, Qwest has developed the QPP to replace the UNE-P. [Redacted] [Redacted] [Redacted] [Redacted] [Redacted] [Redacted] [Redacted] [Redacted] [Redacted] [Redacted] [Redacted] [Redacted] [Redacted] [Redacted]. Opponents also advance the price squeeze argument, which Qwest refutes above in Section II.C.1.a. Further, opponents claim that cable modem, satellite and wireless offer no wholesale competition.[84] This is refuted in Section II.C.1.b. In sum, the first forbearance condition is met.

2. Avoided Cost Resale Is Not Necessary To Protect Consumers

Consumers have choices from non-Qwest providers who are not reselling services made available at an avoided cost discount. EarthLink quibbles with the extent to which there is competition from multiple sources and technologies.[85] As shown above, in some states within Qwest's region "other" technologies have a very significant market share. Moreover, cable modem leads Qwest in market share in every state for which the Commission reports cable modem subscribership.

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[83] *See, e.g.,* FISPA at 5.

[84] *See, e.g.,* EarthLink at 20.

[85] EarthLink at 22.

Eschelon argues that it will not be able to compete in voice sales if it cannot get DSL at an avoided cost discount.[86] Eschelon's concern should be assuaged by the recent QPP contract. Even if it had not contracted with Qwest Eschelon may have been able to contract with cable modem providers, as MCI did, or with a Data LEC. In sum, the second forbearance condition is met.

3. Avoided Cost Resale Is Not In The Public Interest

Qwest has demonstrated that forbearance from resale at an avoided cost discount will enhance price competition by incenting Qwest to engage in more promotions. Opponents argue that eliminating avoided cost resale is not in the public interest because CLECs must have wholesale access to xDSL at prices they like.[87] In a related argument EarthLink claims that avoided cost resale is necessary to allow CLECs to check incumbent LEC prices to ISPs.[88] As shown above in Section II.B.1., the availability of satellite, wireless and cable modem constrain Qwest's prices to intramodal competitors like CLECs and ISPs. In sum, the third forbearance condition is met.

III. CONCLUSION

Congress adopted Section 10 because it recognized that regulation can be unnecessary and even harmful in a competitive market. As the Commission and the courts have acknowledged mass market broadband services are already robustly competitive. Therefore, competition -- without dominant carrier tariff regulation, rate averaging, or resale at an avoided cost discount -- is sufficient to constrain prices, incent deployment and stimulate quality of

[86] Eschelon at 18-19.

[87] ALTS at 5.

[88] EarthLink at 23.

service improvements. For these reasons the Commission should grant Qwest's petition and exercise its forbearance authority.

Respectfully submitted,

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February 7, 2005

ATTACHMENT A

REPLY DECLARATION OF REX MORSE

1. My name is Rex Morse. I am a Lead Network Planning Engineer employed by Qwest Corporation. I have been employed by Qwest Corporation for 25 years.
2. I prepare the FCC Form 477 – Local Competition and Broadband Reporting ("FCC Form 477") for Qwest Corporation for each state in which Qwest Corporation conducts business as an ILEC. Gregory Smith, in the Public Policy Department, provides direction and guidance in this effort.
3. I developed the data for Part I: Broadband, line I-1 "Asymmetric xDSL", column (a) "Total one-way and two-way (full) broadband lines and wireless channels" by extracting xDSL product quantities from the billing system. The xDSL product count includes the quantities for all Universal Service Order Codes ("USOCs") that provide xDSL service to end users plus the USOCs that lease just the xDSL channel to a reseller. Included in this count are lines provided as unbundled network elements, or line sharing, and also lines provided for resale, whether to competitive local exchange carriers or to Internet service providers such as Earthlink or AOL. Official Services, *i.e.*, any lines Qwest Corporation provides for its own use, are excluded from the count. Thus, the date reported on line I-1, column (a) reflects all Asymmetric xDSL lines, including lines provided to resellers, as well as those directly billed to end users by Qwest. The data on line I-1, column (a) include all Asymmetric xDSL lines, not just those provided to residential and small business customers.
4. The billing records that I used are kept in the course of Qwest's regularly conducted business activity. It is Qwest Corporation's regular practice to keep these billing records in a manner that allows one to accurately extract product quantities.

5. As of June 30, 2004, Qwest Corporation reported the following quantities of Asymmetric xDSL lines, on Line I-1, column (a) of FCC Form 477:

STATE	**Number of Asymmetric xDSL lines**
Arizona	[Redacted]
Colorado	[Redacted]
Idaho	[Redacted]
Iowa	[Redacted]
Minnesota	[Redacted]
Montana	[Redacted]
Nebraska	[Redacted]
New Mexico	[Redacted]
North Dakota	[Redacted]
Oregon	[Redacted]
South Dakota	[Redacted]
Utah	[Redacted]
Washington	[Redacted]
Wyoming	[Redacted]

I declare under penalty of perjury that the foregoing is true and correct. Executed on February 7, 2005.

Rex Morse

REDACTED – FOR PUBLIC INSPECTION

ATTACHMENT B

TABLE

STATE	%ADSL	% Qwest ADSL	% Cable Modem	%Other
Arizona	17%	[Redacted]	73%	9%
Colorado	39%	[Redacted]	54%	8%
Idaho	35%	[Redacted]	Not available	Not available
Iowa	29%	[Redacted]	66%	6%
Minnesota	28%	[Redacted]	63%	9%
Montana	49%	[Redacted]	40%	11%
Nebraska	18%	[Redacted]	72%	11%
New Mexico	44%	[Redacted]	49%	7%
North Dakota	49%	[Redacted]	37%	14%
Oregon	32%	[Redacted]	60%	8%
South Dakota	45%	[Redacted]	36%	20%
Utah	48%	[Redacted]	Not available	Not available
Washington	39%	[Redacted]	55%	6%
Wyoming	38%	[Redacted]	Not available!	Not available

Source: Reply Declaration of Rex Morse and Industry Analysis and Technology Division, Wireline Competition Bureau, *High Speed Services for Internet Access: Status as of June 30, 2003* at Table 7 (Dec. 2004).

CERTIFICATE OF SERVICE

I, Richard Grozier, do hereby certify that I have caused the foregoing **(REDACTED – FOR PUBLIC INSPECTION) REPLY COMMENTS OF QWEST CORPORATION** to be 1) filed with the FCC via its Electronic Comment Filing System in WC Docket No. 04-416, 2) served, via e-mail, on Ms. Janice Myles, Competition Policy Division, Wireline Competition Bureau at janice.myles@fcc.gov, 3) served, via e-mail, on the FCC's duplicating contractor Best Copy and Printing, Inc. at fcc@bcpiweb.com, and 4) served via First Class United States mail, postage prepaid, on the parties listed on the attached service list.

Richard Grozier
Richard Grozier

February 7, 2005

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